No. 324

Supreme Court of the United States

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY and WABASH RAILROAD COMPANY, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS; HOWARD L. LOVE; J. RALPH HUTCHINSON, Members of the Missouri State Tax Commission; and J. R. TOWSON, Secretary of the Missouri State Tax Commission, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Missouri, which affirmed a trial court judgment sustaining against federal constitutional challenge the assessment by a state agency of their properties for purposes of ad valorem taxation.

OPINIONS BELOW

The Circuit Court of Cole County, Missouri, did not render an opinion. The opinion of the Supreme Court of Missouri (R. 176-92) is not reported. It is printed as Appendix B to this Statement (pp. 4a-21a, *infra*).

JURISDICTION

This is a proceeding brought by appellants challenging the assessment of their properties for ad valorem property taxation purposes on the ground that the state statute under which the Missouri State Tax Commission assessed their properties was invalid in its application to them. The judgment of the Supreme Court of Missouri (R. 175; 21a, *infra*) was entered on December 30, 1966. A timely filed motion for rehearing was denied on February 13, 1967. A notice of appeal to this Court was filed in the Supreme Court of Missouri on May 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Great Northern Ry. v. Minnesota,* 278 U.S. 503 (1929); *Southern Ry. v. Kentucky,* 274 U.S. 76 (1927); *Union Tank Line Co. v. Wright,* 249 U.S. 275 (1919).

STATUTES INVOLVED

Section 151.060(3) of the Statutes of Missouri provides in its part most pertinent to this case:

> "In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is en-

titled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Section 151.060 and other Missouri statutory provisions are set out in full in Appendix A to this Statement (pp. 1a-3a, *infra*).

QUESTIONS PRESENTED

Section 151.060 of the Revised Statutes of Missouri prescribes a formula for assessing the rolling stock of interstate railroads for the purpose of ad valorem property taxation. The formula involves the application to a value determined for a railroad's entire complement of rolling stock of the ratio of the miles of road operated in Missouri to the railroad's total road mileage. On October 16, 1964, the appellant Norfolk & Western became the lessee of all the properties of the appellant Wabash, which had tracks and operations in Missouri, as the Norfolk & Western did not. For the following year, as of January 1, 1965, a property tax assessment for rolling stock was made against the Norfolk & Western based upon applying to the value of the entire Norfolk & Western fleet, owned and leased, the ratio of the leased road mileage in Missouri to total Norfolk & Western mileage.

The questions presented are these:

1. Whether, in its application to these appellants, Section 151.060 of the Revised Statutes of Missouri is

repugnant to the Constitution of the United States in that it lays an undue burden upon or discriminates against interstate commerce in violation of the commerce clause, Article I, Section 8, or deprives them of property without due process of law in violation of the Fourteenth Amendment because in such application it results in an assessment of railroad rolling stock for Missouri property taxation purposes greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

2. Whether the use by the Missouri State Tax Commission solely of a mileage ratio formula in assessing the value of the appellants' rolling stock for Missouri property tax purposes contravenes the Constitution of the United States by laying an undue burden upon or discriminating against interstate commerce in violation of the commerce clause, Article I, Section 8, or by depriving these appellants of property without due process of law in violation of the Fourteenth Amendment because the use of the formula results in an assessment greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

STATEMENT

On October 16, 1964, the appellant Norfolk & Western Railway Company acquired all the properties of the appellant Wabash Railroad Company under a long-term lease. The Wabash, an Ohio corporation that does not maintain its principal office in Missouri, has lines of track in Missouri and operated trains over those tracks. At the time the lease became effective the Norfolk & Western had no tracks in Missouri or other

operational connection with that state. It is a Virginia corporation with its principal office in Roanoke. As lessee of all the properties of the Wabash, the Norfolk & Western became liable for the ad valorem property taxes on such properties located within Missouri. Subsequently, as of January 1, 1966, the Norfolk & Western bought the Wabash rolling stock previously leased; it continues to lease the fixed property of the Wabash.

The questions in this case arise from the assessment of rolling stock for Missouri property tax purposes in the first tax year after the lease.[1] The assessment was for nearly $20 million, which is almost three times as much as the taxable value of the average amount of the carriers' rolling stock—almost all of it Wabash rolling stock—in Missouri at any relevant time and more than twice what the Wabash was assessed for rolling stock the previous year, although there had been no change of any consequence in operations or in the number of locomotives and cars in Missouri.

The facts were stipulated or otherwise developed by the appellants without contradiction in the course of a hearing before the State Tax Commission on protest of its notice of an assessment in the amount stated. A summary of the facts follows.

The assessment of rolling stock was arrived at by a mechanical application by the Tax Commission of the formula prescribed in Section 151.060 of the Revised Statutes of Missouri. The formula there prescribed is a form of the familiar mileage ratio formula. Acting

[1] The questions recur with each yearly assessment. The Missouri Tax Commission has followed the same questioned method in assessing appellants' property in 1966 and 1967.

under the formula, the Tax Commission first determined the value of all rolling stock owned or leased by the Norfolk & Western as of the tax day, January 1, 1965. This determination was made by simply totaling the cost, less accrued depreciation at 5 per cent a year (up to 75 per cent of cost), of each locomotive, car and other item of rolling stock. The determination is made in the same way for every interstate railroad operating in Missouri. In appellants' case the determination was based on data submitted by the appellants (*see* Exs 1, 32, 40), which the Commission accepted without question. Then, as it did for all railroads and utilities for the year 1965, the Commission took 47 per cent of the total value as the equalized value of the Norfolk & Western's entire complement of rolling stock.[2] Having determined that slightly more than 8 per cent of the mileage of all the main and branch line road owned, leased or controlled by the Norfolk & Western was within Missouri, the Commission applied this percentage to the overall depreciated equalized rolling stock value. The resulting figure was $19,981,757. Fixed property, which is valued physically without resort to the mileage formula, was assessed at $12,177,597. (No question was raised below or is raised on this appeal concerning the valuation of fixed property.) The Commission deducted from the sum of these two figures $860,415, representing a so-called "economic factor" that is allowed to all railroads in varying amounts. (R. 8-10). An "economic factor"

[2] The computation of an equalized value is the traditional process sometimes described as assigning or computing an assessed value, which usually is less than full market value. Property other than railroad and utility property is assessed by local assessors in Missouri at a certain percentage of its market value, frequently less than 47%.

in precisely the same amount had been allowed to the Wabash in each of the immediately preceding three years. Thus, the total assessment was $31,298,939.

The questioned part of this assessment is the nearly $20 million purportedly representing the value of appellants' rolling stock in Missouri. This figure was derived by applying the statutory formula to the total depreciated, equalized value of appellants' fleet of rolling stock, the great bulk of which is specialized coal-carrying equipment. This equipment is used almost exclusively in the eastern coal-producing region of the United States, which requires a disproportionately large number of units, and only rarely does any of this equipment pass through Missouri. In 1964, 70 per cent of the Norfolk & Western's total revenue was from coal traffic. More coal is loaded on its line than on the line of any other railroad in the United States. Its coal traffic moves from the mines of Virginia, West Virginia and Kentucky to the seaboard area and the manufacturing centers of the East and to the steel mills in the Great Lakes area. During 1964 less than .03 per cent of all Norfolk & Western shipments of coal from Virginia, West Virginia and Kentucky could have gone through Missouri, and none was destined for Missouri. (R. 56-58, 82-84; Ex. 17).

The Norfolk & Western maintains in these eastern coal mining regions special locomotives designed specifically for pulling heavy coal trains on grades and equipped with dynamic brakes for handling such loads. None of the Norfolk & Western's locomotives was in Missouri on January 1, 1965, or at any time during 1964. Their design makes it impossible to use them in combination with the locomotives employed on the

Wabash's Missouri lines, and locomotives today are customarily used in combination. (R. 61-67).

As of January 1, 1965, tax day, the Norfolk & Western owned 63,989 coal hopper cars, which are also used primarily in the coal mining regions. On tax day only 163 of these hopper cars were in Missouri either on the line leased from the Wabash or on the line of some other railroad. (R. 74-75, 88-89; Exs. 12, 14, 18, 19). Tax day was by no means atypical in this respect, for scarcely any Norfolk & Western coal mined in Virginia, West Virginia and Kentucky was shipped to points west of the Mississippi. And special rules of the Association of American Railroads issued under Interstate Commerce Commission authority require that Norfolk & Western hoppers that go off line be returned as promptly as possible to the coal mining regions of the East, so that hoppers cannot lawfully enter Missouri under the control of other railroads. (R. 58-60; Ex. 6).

A further demonstration of the unreliability of the Missouri road mileage as an index to the amount of Norfolk & Western system rolling stock in Missouri was provided by a study of traffic density. Density in Missouri as measured by ton miles per mile of road was only 54 per cent of the traffic density for the entire Norfolk & Western system. There is a close relationship between the rolling stock used in a given area and the density of traffic in that area, as measured by ton miles per mile of road. (R. 51-52, 101-02; Ex. 4).

There were, of course, some locomotives and cars of the Norfolk & Western system in Missouri on January 1, 1965, and on other days. All of these locomotives and almost all of these cars were locomotives and cars leased by the Norfolk & Western from the Wabash.

Studies showed that at 47 per cent of cost less accrued depreciation (*i.e.*, valued in the same way as the Tax Commission valued the Norfolk & Western fleet), the rolling stock owned or leased by the Norfolk & Western that was in Missouri on January 1, 1965, was worth $7,628,297. In this respect again, tax day was representative of the average presence of Norfolk & Western equipment in Missouri. On December 1, 1964, the depreciated equalized value of rolling stock owned or leased by the Norfolk & Western in Missouri was $7,182,575. The depreciated equalized value of rolling stock owned or leased by the Wabash in Missouri on random days in 1964 before its lease to the Norfolk & Western became effective was $5,891,388, $7,102,891 and $7,268,464, respectively. The average of the five figures for the relevant period is $7,014,723. (R. 103-09, 115-20; Exs. 25-29). It was property of this value that was regularly and habitually in the state, receiving the benefits and protections afforded by the state.

The units of rolling stock actually in Missouri on January 1, 1965, amounted to 2.71 per cent of the total units of Norfolk & Western rolling stock (owned and leased) and accounted for 3.16 per cent of the value of the entire fleet to which the Commission applied the Missouri mileage ratio of 8.2824 per cent in making its assessment.

It is altogether logical that the lease of the Wabash properties by the Norfolk & Western should have had only a minimal impact, if any at all, on the amount and value of rolling stock of the combined carriers in Missouri at any time.

The Wabash is engaged in the hauling of general merchandise on a route that extends from Buffalo to

Kansas City. The acquisition of the Wabash properties by the Norfolk & Western was one of several related transactions in which, *inter alia,* the Norfolk & Western merged with the New York, Chicago & St. Louis Railroad Company, the Nickel Plate, a road that operated in somewhat the same areas as the Wabash; one difference was that the Nickel Plate did not serve Missouri. One of the primary purposes of the transactions was to provide for the Norfolk & Western a greater diversification in its traffic. The Wabash lines parallel the Nickel Plate lines at certain points, and another purpose of the Wabash lease was to effect economies by eliminating duplication of operations and facilities at those points. The only change in operations that occurred as a result of the Wabash lease, insofar as the Wabash lines in Missouri were concerned, was the routing of a few cars through Hannibal that formerly had been routed through East St. Louis. Studies indicated that there was no increase in the number of Norfolk & Western cars on the line of the Wabash at selected dates between February 1, 1964, before the lease became effective, and April 1, 1965, after it became effective. (R. 49-56; Ex. 5).

If in 1965 the Missouri Commission had applied the statutory mileage formula to the Wabash system and Wabash properties, rather than to the Norfolk & Western system and properties, the assessment of rolling stock attributable to Missouri would have been $10,103,340. It had been $9,177,683 the previous year.

The Tax Commission entered its decision on July 6, 1965, making final the assessment it had originally proposed. Appellants filed a petition for review of the Tax Commission's decision in a state trial court. In

their petition appellants asserted that the statutory mileage formula was invalid in its application to them on the ground that it was repugnant to the commerce clause and the due process clause of the Fourteenth Amendment. On the alternative assumption that the Tax Commission was not bound rigidly by the mileage formula, they alleged that its assessment was unlawful on the same two federal constitutional grounds. The trial court sustained the Tax Commission's decision and its assessment on the administrative record. On appeal the Supreme Court of Missouri, recognizing appellants' constitutional challenge, stated that the question was "whether Missouri's method . . . . valid on its face, meets the test of reasonable or fair and workable apportionment in its application to N & W in this case." The decision of the Supreme Court was that the mileage formula was valid as applied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision below is contrary to repeated decisions of this Court that have established constitutional safeguards against abuse by the states of their unquestioned power to provide practical means of determining a tax base for the property of interstate enterprises that is constantly moving in and out of a state. The Court has held that any such means must be fair in operation and must not have the practical effect of taxing out-of-state property or subjecting the interstate enterprise to the possibility of double taxation on its property. This is a manifestation of "the continuing concern for fair apportionment which this Court has displayed over the years in scrutinizing state taxing statutes." *General Motors Corp. v. District of Columbia,* 380 U.S. 553, 561-62 (1965). The mileage formula prescribed by Section 151.060 of the Revised

Statutes of Missouri and used by the State Tax Commission here is one resolution of the problem of valuing interstate carriers' rolling stock for tax purposes. The formula is valid on its face and, presumably, in most of its applications. This is because ordinarily rolling stock of a railroad is distributed among the states in which it operates in rough proportion to the mileage in each state. But in this case because of the concentration of Norfolk & Western coal-carrying rolling stock outside of Missouri use of the mileage formula alone resulted in an assessment greatly in excess of the value of appellants' rolling stock present in Missouri. In sanctioning such use, the Missouri Supreme Court has disregarded this Court's admonitions that both the commerce clause and the due process clause forbid the automatic, mechanical application of the mileage formula in circumstances where it yields an assessed value significantly exceeding the actual value of property present in and subject to taxation by the state.

1. Interstate commerce can be made to pay its way, and instrumentalities of commerce within a state are subject to any nondiscriminatory ad valorem tax to which other property in the state is subject. Where the instrumentalities of commerce are constantly on the move, like railroad cars and locomotives, a nondomiciliary state can assess them by a formula that fairly reflects the value of the rolling stock—constantly changing in its composition—habitually in use in the state. So much has been established at least since the decision of this Court in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891). The formula approved in the *Pullman* case was the formula adopted by Missouri in its statute and used here: application to the total value of a carrier's property, or of its rolling

stock if as in Missouri roadbed and buildings are physically assessed, of the ratio of the carrier's in-state mileage to its total mileage.

The general validity of the mileage formula, reaffirmed by this Court as recently as 1949 in its application to carriers on the inland waterways, *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), is not questioned by appellants. Their reliance rather is on the substantial body of precedent in this Court's opinions that restricts the use of the mileage formula to situations in which in fact it yields a taxable value that is reasonably related to the value of property that on an average is within the assessing state. When the mileage formula is used by a state to value rolling stock of an interstate railroad, the necessary assumption is that there is a roughly even distribution of rolling stock among the states in which the railroad operates. See *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559, 562 (Mo. 1959), quoted in the opinion below (R. 186; pp. 14a-15a, *infra*). Here, because of the nature of the Norfolk & Western's operation, with its heavy concentration of coal-carrying equipment in the area of the coal mines and their natural markets, the assumption was demonstrably erroneous. It is in precisely such circumstances that this Court, invoking both the commerce clause and the due process clause, has invalidated mileage formula assessments.

That the mileage formula would not necessarily be valid in every application was made clear by the Court soon after the *Pullman* decision. In *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 431 (1894), the Court, after noting the general validity of the mileage formula, said that "there may be exceptional cases," as where—an example peculiarly apt to this case—"in

certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."[3]

The limits on the use of the mileage formula foreshadowed by the *Backus* decision were first applied by the Court to invalidate a state assessment in *Fargo v. Hart,* 193 U.S. 490 (1904). Mr. Justice Holmes, speaking for the Court, there explained that it is "reasonable and constitutional to get at the worth of [a line of railroad] in the absence of anything more special, by a mileage proportion." *Id.* at 499. He said that a division by mileage is justifiable "so long as it fairly may be assumed that the different parts of a line are about equal in value . . . ." *Id.* at 500. But if a railroad "had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense." *Ibid.* An assessment based upon a mileage formula was invalidated in *Fargo v. Hart* on the basis of both the due process clause and the commerce clause because, "it involved an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States." *Id.* at 502.

In subsequent cases the Court has reiterated the limitations on the use of the mileage formula laid down in *Fargo v. Hart.* In *Union Tank Line Co. v. Wright,* 249

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[3] In the *Backus* case the Court upheld the statute and the assessment that were at issue but only because factors other than mileage could be considered under the statute and for all that appeared had been considered. *See also* Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 227 (1897); 166 U.S. 185, 222-23 (1897).

U.S. 275 (1919), the application of a mileage formula resulted in an assessment much larger than the value of the average number of cars within the state during the tax year. The Court held "that to permit enforcement of the proposed tax would deprive [the tank line company] of property without due process of law and also unduly burden interstate commerce." *Id.* at 283.[4] In *Wallace v. Hines,* 253 U.S. 66 (1920), the statute provided for applying to the value of a railroad's stocks and bonds the ratio of North Dakota main track mileage to total main track mileage. The Court held that on the allegations of the railroad's complaint "the circumstances are such as to make that mode of assessment indefensible." *Id.* at 69. The circumstances were that it could not fairly be presumed that the value of the line in North Dakota were proportionate to the mileage of the line in North Dakota because it cost less to build the line through the plains of North Dakota than through mountainous regions, and because it followed from North Dakota's status as an agricultural state "that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain." *Id.* at 39.[5] *See also Nashville, C. &*

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[4] The majority opinion in Union Tank Line Co. v. Wright, 249 U.S. 275 (1919), analyzed Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891), at some length and according to a dissent cast unnecessary doubt on the general validity of the mileage formula. 249 U.S. at 290-95. Any intimation that the *Pullman* case had been overruled was dispelled by Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949), if not earlier, but *Union Tank Line* remains authority for the more limited proposition that is the basis of the questions raised by appellants here.

[5] See pp. 20-21, *infra,* for discussion of an alternative, related ground of decision in *Wallace* v. *Hines.*

St. L. Ry. v. Browning, 310 U.S. 362, 365-66 (1940); *Rowley v. Chicago & N.W. Ry.,* 293 U.S. 102, 110 (1934); *Southern Ry. v. Kentucky,* 274 U.S. 76 (1927).

Insofar as the treatment of rolling stock is concerned, the principle of the cases we have cited and quoted was distilled by Mr. Justice Douglas, concurring in *Braniff Airways v. Nebraska State Bd.,* 347 U.S. 590, 603 (1954):

> "My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem."

In this case it is quite clear that Missouri has attempted to tax more than the permitted fraction. The theory underlying a mileage formula is that rolling stock is about evenly distributed throughout a railroad's entire system. The theory was undercut by the uncontradicted facts of record here. The relevant uncontradicted facts are that the Norfolk & Western's rolling stock, particularly its special coal locomotives and hoppers, is concentrated in the coal areas miles from Missouri; that the density of its Missouri traffic is only slightly more than half that of its system as a whole, indicating a disproportionately small amount of rolling stock in Missouri; that the ratio of rolling stock in Missouri on tax day and other random days to total rolling stock was considerably less than half the ratio of Missouri mileage to total mileage, and that in consequence the attempted Missouri assessment

is almost three times the value for tax purposes of the average units of rolling stock in Missouri at any time.

2. The court below did not ignore these facts, but it completely discounted them, apparently because of an odd misapplication of the so-called "enhancement of value" theory. It noted first that valuation under a properly applied unit system of valuation takes into account the fact that "rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole . . . ." (R. 185; p. 14a, *infra*). The court then observed, with respect to one of the comparisons appellants made of record, that proportions of rolling stock in Missouri, by number and by value, were not conclusive on the issue of fair apportionment "because, quite obviously, they do not recognize any justified enhanced or augmented value to the portion actually in Missouri brought about by being merged into the entire N & W system." (R. 188-89; pp. 17a-18a, *infra*). This statement betrays a misconception of (a) what this Court has said concerning enhancement of property values by reason of a unitary operation, (b) what the State Tax Commission actually did in this case and (c) what the relationship is between the original Norfolk & Western system and the old Wabash lines.

This Court has said in a number of cases that a state may constitutionally use a method of valuation (such as a method that takes account of intangible values) or choose a subject or measure for an apportioned tax (such as gross receipts) that reflects the value of property as enhanced or augmented by reason of its being a part of a system that extends outside the state. *E.g., Railway Express Agency v. Virginia,* 358 U.S. 434

(1959); *Pullman Co. v. Richardson,* 261 U.S. 330, 338 (1923); *Cudahy Packing Co. v. Minnesota,* 246 U.S. 450 (1918); *Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194, 220-26 (1897); *Cleveland, C.C. & St. L. Ry. v. Backus,* 154 U.S. 439, 445-46 (1894). This idea of enhancement of value has never, however, been regarded as a justification for the taxing state's taking into its assessment a portion of the total system value not reasonably related to the value of the property that the facts show can fairly be attributed to it. The court below has said in substance that, using the mileage formula, Missouri is justified by the enhancement-of-value doctrine in taxing more than 8 per cent of appellants' rolling stock instead of the 3 per cent of locomotives and cars that were present in the state. That this course is impermissible is shown by opinions of this Court in which approbatory references to the enhancement doctrine stand side-by-side with strictures against misuse of the mileage formula to tax property outside the state. *See Wallace v. Hines,* 253 U.S. 66, 69-70 (1920); *Union Tank Line Co. v. Wright,* 249 U.S. 275, 282 (1919); *Fargo v. Hart,* 193 U.S. 490, 499-500 (1904).

The court below misunderstood this basic concept. It seems also to have misconceived the nature of the actions of the State Tax Commission. The Commission did not profess to assess any amount to the Norfolk & Western because of a judgment that the value of the locomotives and cars that were in Missouri had increased because of the combination of the Norfolk & Western and Wabash systems. As it did for all interstate railroads, it simply applied the mileage formula to figures supplied to it by the railroads. The court below did say that "a formula alone was not the only

item available to the Commission's consideration." (R. 191; p. 20a, *infra*). If by this it meant to imply that other factors were considered by the Commission, the implication is refuted by the Commission itself. In a stipulation entered into by the Commission, the assessment steps we have described (pp. 5-7, *supra*)—which are nothing but the application of the formula—are recited, and the stipulation concludes with the statement that "*as the result of the above method of* assessment and computation, a total assessed valuation was made of $31,298,939." (R. 8-10). The assessment of the rolling stock substantially exceeded the value, comparably computed, of rolling stock that on an average was in Missouri. This excess is what the Missouri Supreme Court justified as based on the enhanced or augmented value of property. But the excess was merely a necessary product of the fact that the assumption of equal division of rolling stock underlying the mileage formula was unfounded in this case because of the low density of traffic on the Missouri lines and the concentration elsewhere of dense coal traffic and the Norfolk & Western rolling stock used to handle it. The untenability of the Missouri Supreme Court's position is demonstrated by the fact that the Tax Commission did not enhance or augment the value of the fixed property of the Wabash in Missouri, *i.e.*, roadbed and buildings, leased by the Norfolk & Western. These items are assessed without use of a formula, and the assessment of them to the Norfolk & Western was of the same order as the assessment of them to the Wabash in the previous year—$12,177,597 as against $12,092,594.

But even if the enhancement-of-value theory were available somehow to increase the quantity of rolling

stock to which Missouri can apply its tax, the Missouri Tax Commission could not properly have invoked it here. Operations in Missouri over the Wabash lines were very much the same after the lease to the Norfolk & Western as they were before. The evidence was undisputed that the coal-carrying equipment used by the Norfolk & Western in the eastern coal regions could have had no effect on the value of the rolling stock used in Missouri. This coal-hauling equipment, which accounted for a large part of the entire value of the rolling stock of the Norfolk & Western, was utilized primarily in movements from the mines of Kentucky, West Virginia and Virginia to the eastern seaboard and the Great Lakes. None of the coal from those mines carried by the Norfolk & Western during the year was destined for Missouri. Thus it cannot be said that the coal-hauling equipment "in some plain and fairly intelligible way . . . adds to the value of the road and the rights exercised in the state," a prerequisite established by this Court for taking into account property outside the state to get the true value of things within it. *See Wallace v. Hines,* 253 U.S. 66, 69 (1920). *See also Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194, 222 (1897).

One final point in this regard: In *Wallace v. Hines* the Court saw two defects in the use of the mileage formula. One we have previously mentioned (p. 15, *supra*)—that the circumstances belied an assumption that the per mile value of track within the state was equal to the per mile value of track outside the state. The other is the defect suggested by the passage quoted just above—that "the possession of bonds secured by mortgage of lands in other States, or of a land grant in another State or of other property that adds to the

riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax . . . ." 253 U.S. at 70. Here the two bases for setting aside a mileage formula assessment or invalidating a mileage formula statute in its application coalesce. The coal operations, physically separated from Missouri, that make the Norfolk & Western's Missouri tracks abnormally low in the amount of rolling stock using them likewise do not add to the value of the track or the cars that operate over it.

3. There is undoubtedly room for flexibility and ingenuity in devising and applying formulas for state taxation of items like railroad cars. In emphasizing the disparity between the result yielded by mechanical application of the Missouri mileage formula and the value of Norfolk & Western rolling stock that on an average was in Missouri, we do not mean to imply that a state is restricted to counting cars on typical days and valuing them. It is, however, worthwhile to recall that the proper aim of any formula is to determine the value of what is within the state. In a case such as this of a nondomiciliary state, it is only what is within the state, what is habitually present there, that is subject to taxation. And the average number of units of rolling stock within the state has been regarded by this Court as the most obvious and natural index to the magnitude of what is habitually present. *See Central R.R. v. Pennsylvania,* 370 U.S. 607, 613-14 (1962); *Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell,* 290 U.S. 158, 162-63 (1933).

This point takes on added importance from this Court's decision in *Central R.R. v. Pennsylvania, supra.* There the Court reaffirmed the rule that the state of domicile may constitutionally tax the entire

value of a carrier's fleet, other than the value attributable to units shown to be habitually present in a particular other state and thus subject to taxation by it. *See New York Cent. R.R. v. Miller,* 202 U.S. 584 (1906). And, as we have indicated above, the Court was explicit that daily average units in a state is a proper measure of habitual presence in the state.[6] *See* 370 U.S. at 613-14.

In the light of this decision, the decision below raises distinct possibilities of effective double taxation of portions of a carrier's fleet. For on a fair reading of the *Central Railroad* opinion a domicilary state need not accommodate its taxation policy to the possibility that a mileage formula such as Missouri's will yield a result far removed from any fair valuation of the average number of cars in Missouri; and it appears that a nondomiciliary state may tax the average number of rolling units of stock within its borders without regard to the fact that by operation of the mileage formula a part of their value may have been subjected to tax in some other state.

CONCLUSION

The decision below conflicts with decisions of this Court. It cannot be sustained on the ground advanced

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[6] When the Court in Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949), sanctioned assessment of vessels on inland waterways according to the mileage formula, it noted an objection that the visits of the vessels to the assessing state were sporadic "and that there was no average number of vessels in the State every day." *Id.* at 175. The Court did not pass upon the objection, accepting the assurance of the assessing state's attorney general that the statute was meant to cover and did cover "an average portion of property permanently within the State—and by permanently is meant throughout the taxing year." *Id.* at 175; *see* Central R.R. v. Pennsylvania, 370 U.S. 607, 617 (1962).

by the court below to sustain it. If allowed to stand, it invites double taxation of railroad rolling stock. Probable jurisdiction should be noted and the case set for argument on the merits.

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